

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1232 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

BHUPATBHAI UKKADBHAI TADVI

Versus

STATE OF GUJARAT

Appearance:

MRS SHILPA J UNWALLA for Appellant
MR AJ DESAI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 08/04/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. This Appeal is preferred by original accused of Sessions Case No. 169 of 1998 of the Court of Sessions, Bharuch Camp at Rajpipla against an order and judgment dated 27.10.1999 delivered by Additional Sessions Judge, Bharuch Camp at Rajpipla, convicting the accused appellant for the offence proved against him under Section 302 IPC and sentencing him for the life imprisonment and fine of Rs. 500/- in default to undergo SI of 30 days. The accused - appellant was acquitted by the learned Additional Sessions Judge by the very judgment and order for the offence charged against the appellant - accused under Section 504 of the Indian Penal Code.

2. As per the prosecution case, Complainant PW-1 Shantaben Babubhai, was residing with her deceased husband at Rampara village. On the day of the incident i.e. on 20.6.1998, her deceased husband Babubhai had been to village Nava Rampara to his younger brother for recovering a calf of the cow which had come in the share of the deceased. Deceased Babubhai recovered calf from his younger brother and at noon he returned to village Juna Rampara. When deceased had visited village Nava Rampara, he had altercation and dispute about calf with Ukkadbhai and Rameshbhai. Calf was tethered at the house of deceased but getting free the calf had run away. On the same day, at about 7.00 p.m. Bhupatbhai Son of Ukkadbhai brother of the deceased came to her house and started quarreling with her husband. Accused had a stick with him and inflicted four to five stick blows on the deceased. She tried to intervene but she was pushed away by him. Her husband was taken to hospital where he was declared dead. It appears from the prosecution case that on 20.6.1996 Police was informed and on this information PW-11 Sundarlal Ambalal Desai reached at village Juna Rampara and recorded the complaint of PW-1 Shantaben, wife of the deceased and started investigation and filed charge sheet.

3. The case was committed to the Court of Sessions and vide Exh.2 a charge was framed against accused appellant, to which he pleaded not guilty. The prosecution therefore examined as many as 11 witnesses and produced on record documentary evidence. After hearing both the parties and recording the statement of the appellant - accused under Section 313 of the Cr.P.C., wherein his defence was of total denial, the learned Judge delivered the judgment, which is impugned in this Appeal.

4. Learned Advocate Mrs. Shilpa J Unwalla for the

appellant and learned APP Mr.A.J. Desai for the respondent State were heard at length.

5. When we appreciated the prosecution evidence, it clearly appears that the case of the prosecution rests on single eye witness PW-1 Shantaben, wife of the deceased. She has stated that the dispute was about a calf of a cow which had come to the share of her husband Babubhai. Therefore, Babubhai had been to Nava Rampara to his younger brother for recovering calf of that cow. Babubhai had taken that calf and was tethered near her house but, however, the calf was let lose and had run away. On the very day in the evening accused being son of Ukkadbhai, brother of the deceased, came to the house of deceased and started quarrel and inflicted four - five blows of stick (dang) on the body of the deceased, due to which the deceased had died. Against this witness though she has been cross-examined in detail but nothing is brought out by the defence to disbelieve PW-1 Shantaben. No convincing reasons are found from the record to disbelieve the evidence of PW-1 Shantaben. True it is that, PW-1 Shantaben being wife of the deceased is highly interested witness and, therefore, her evidence is scrutinised carefully. Her presence, on screening, is found natural at the scene of incident because the incident has taken place just near the house of the deceased. She is corroborated fully by her complaint which is at Exh.24. This complaint is further corroborated by Investigating Officer PW-11 Sundarlal Ambalal Desai. No contradiction could be proved in this respect by the defence. In these circumstances, the argument advanced that the other family members of the deceased were not examined is meritless because it is not the quantity of the evidence but the quality of the evidence is material. The evidence of PW-1 Shantaben is of quality and discrediting her for no sound reason, would be doing injustice to a truthful witness. When her evidence is corroborated by complaint, by Investigating Officer and Medical Officer PW-10 Manojkumar Virendraprasad Mishra, we have no doubt in our mind that the incident is amply proved by the prosecution through this unblemished natural evidence. When this fact was confronted to learned Advocate for the appellant, she restricted her argument to the extent only that if the incident is proved against the accused, then the question is whether the accused - appellant is liable for culpable homicide amounting to murder or for any other lesser offence. It was argued by learned Advocate for the appellant that the cause of dispute was trivial. The injuries inflicted were not on vital part. The weapon used by the accused is a stick (dang) which is every day

used by villagers and, therefore, according to learned Advocate for the appellant there was no intention on the part of the accused - appellant to kill the deceased or to cause such injuries which was likely to cause death.

6. While we are satisfied with the evidence of the prosecution about the incident and about the injuries inflicted by the accused on the deceased, it is necessary to appreciate now whether accused - appellant was guilty for the offence punishable under Section 302 as has been held by the learned Trial Judge. To arrive at just conclusion, it is necessary to scan the medical evidence in this respect.

7. PW-10 Exh. 20 Dr. Manojkumar Virendraprasad Mishra, Medical Officer, Garudeshwar, has been examined by the prosecution who stated that on 21st of June, 1998 while he was serving as Medical Officer at Primary Health Centre, Garudeshwar, with Police Yadi dead body of Babubhai was forwarded to him for postmortem. On the same day he started postmortem at 11.00 a.m. According to him, the deceased had following internal injuries.

- (1) Left hand upper limb 4" above the left elbow joint compound fracture humerus broken.
- (2) Rt. leg (lower limb) 6" below the Rt. knee joint radius broken into pieces 1'2" blend cut upper surface of the left lower leg.
- (3) T3 - T12 broken to heavy pressure on the chest (left side chest).

According to PW-10 Dr. Manojkumar Virendraprasad Mishra, the deceased had the following four internal injuries:

- (1) On left side rib No. 3 and 12 were fractured.
- (2) Left lung was torn due to the fracture of ribs.
- (3) Spleen was ruptured.
- (4) Peritoneal cavity was found with profused bleeding.

The cause of death, according to PW-10 Dr. Manojkumar Virendraprasad Mishra was due to traumatic

injury leading to rupture to spleen and lungs leading to irresistible shock ultimately death.

He produced on record Post Mortem Note at Exh. 21.

8. Sections 299 and 300 of the Indian Penal Code establishes three types of culpable homicide. The highest degree of culpable homicide is amounting to murder as defined by Section 300 and punishable under Section 302 of the Indian Penal Code while lesser degree of the culpable homicides are defined by Section 299 and punishable under Section 304 Part-I and Part-II of the Indian Penal Code.

The distinction between all the three degrees of culpable homicide is one of proportion of gravity of mens rea of the appellant - accused. Therefore, when it is argued that the particular act would not amount to the highest degree culpable homicide and would be of lesser degree of culpable homicide, it is necessary that the mens rea of the accused should be measured from the facts of the case and other attending circumstances. It is necessary to consider that whether the act was done with intention to causing death or with intention of causing such bodily injury as to cause death or the injury was caused with the knowledge that the injury was likely to cause death.

9. In this respect when we refer to the facts of the case, it is amply established that the blows causing three injuries on the deceased was by stick, and that is the opinion of the Medical Officer. Out of these three injuries, one was on left hand, second was on right knee and third was on the chest causing fracture on third and twelfth ribs. Now from the medical opinion it is clear that due to fractures on the ribs, left lung was ruptured and spleen was also ruptured. It is also necessary to keep in mind that the death was due to rupture on spleen and left lung of the deceased. Therefore, the question is whether there was an intention on the part of the accused - appellant to cause such injuries to the deceased which resulted in rupture of lungs and spleen. In deciding the question of intention of causing death, the nature of the weapon used, the part of the body on which blow was given, the force and number of blows, are factors, from which an inference as to the intention can be drawn. A men's intention must, in the generality of cases, be gathered only from his act. Act done with the knowledge referred under Section 299 is an act with certain state of mind, committed by the accused which is

punishable under Second Part of Section-304 of the Indian Penal Code. Knowledge as contrasted with intention would more probably signified as a state of mental realization in which the mind is a recipient of certain ideas and impressions arises in it or passing before it.

10. Considering the circumstances of the case as a whole it clearly appears that the incident occurred on account of a trivial issue of possession of a calf. Accused and deceased were cousin brothers. The weapon used by accused is stick (dang). The injuries inflicted except one were not on vital parts of the body. In these circumstances, we can easily deduce that there was no intention on the part of the accused - appellant to cause death of the deceased but the intention of the accused appellant was to teach a sound lesson to the deceased for taking away a calf from his father and enter into altercation with his father for that purpose. Had it been the intention of the accused - appellant to cause death of the deceased, then in the given circumstances of the prosecution case, we must have found more injuries on the vital parts of the body but instead only one injury i.e. on chest is found on vital part of the body while other two injuries are on hand and leg. It is necessary to consider along with this fact that rupture of a spleen and lung is not direct result of the injury caused by the appellant - accused to the deceased. It is clear cut opinion of PW-10 Dr. Manojkumar Virendraprasad Mishra that the lung was ruptured due to the fracture of left ribs and in all probability, perhaps, the spleen was also ruptured due to the fracture of the rib because we do not find that external injury, by which directly the spleen would have been ruptured. Now in these circumstances when we take stock of all the circumstances together, it is clear that at the most we can impute knowledge on the part of the accused appellant to cause injury of the fracture of the ribs but we cannot attribute and impute intention on the part of the accused to that far stretching extent that his intention was to cause injury on the chest and thereby cause fracture and thereby cause rupture of spleen and lungs. Thus, therefore, we can safely say that the required mens rea which is essential to prove the highest degree of culpable homicide is totally absent in this case. True it is that when an injury is caused by stick (dang) on a chest, knowledge can be imputed on the part of the accused that when he is inflicting injuries on the part of the body like chest, it may result in death. Therefore, no intention on the part of the accused to kill the deceased be deduced from the proved facts, but since the injury is caused on chest, ordinarily, author of such injury must be imputed

with knowledge that an injury on such vital part of the body may result in death. The learned Trial Judge failed to appreciate this important aspect of the prosecution case and convicted the accused under Section 302 of the IPC for the highest degree of culpable homicide while in view of the above discussion we find that at the most the accused - appellant can be held guilty under Section 304 Part-II of the Indian Penal Code for the act done with the knowledge that the injury caused to the deceased may result in death. In this view of the matter, the conviction awarded by the learned Trial Judge under Section 302 of the IPC to the appellant - accused and sentencing him for the life imprisonment and fine will have to be set aside and we find that the accused - appellant is guilty for the offence punishable under Section 304 Part-II of the IPC and we convict the accused - appellant accordingly for the offence punishable under Section 304 Part-II of the Indian Penal Code.

11. Now the question is what punishment should be awarded to the accused - appellant for the offence proved against him under Section 304 Part-II. It has been found from the record of the Trial Court that the accused is extremely poor, he was young and aged about 28 years when the incident occurred, he has his family, from the jail record which is produced by learned APP we found that his jail conduct is good, and taking all the aspects into consideration we found it proper to award punishment of 7 years R.I. for the offence proved against him under Section 304 Part-II of the Indian Penal Code instead of life imprisonment as awarded by the learned Trial Judge for the offence under Section 302 of the IPC. To this extent, we interfere in the judgment and order impugned in this Appeal and to this extent the appeal of the appellant - accused is required to be allowed and hence the following order.

12. In the result, this Appeal is partly allowed to the extent that impugned order and judgment convicting the present appellant accused for the charge under Section 302 and sentencing him for the life imprisonment and with fine of Rs.500/- in default to undergo S.I. of 30 days is hereby quashed and set aside, instead the appellant - accused is convicted for the lesser offence for the charges under Section 304 Part-II of the IPC and the appellant accused is sentenced for the rigorous imprisonment of 7 years. Fine if paid by the appellant be refunded to him.

(B.J.Shethna, J.)

(J.R. Vora, J.)

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